No. 84-1384

Office-Supreme Court, U.S.
FILED
MAR 29 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

vs.

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS CARSON-TRUCKEE WATER CONSERVANCY DISTRICT AND SIERRA PACIFIC POWER COMPANY IN OPPOSITION

ANDREW J. OGILVIE*
JOHN M. COLLETTE
COLLETTE & ERICKSON
555 California Street, 43rd Floor
San Francisco, California 94104
(415) 788-4646
JOHN MADARIAGA
SUSAN L. OLDHAM
Sierra Pacific Power Company
Post Office Box 10100
Reno, Nevada 89510
(702) 789-4349
JAMES W. JOHNSON, JR.
JOHNSON & ADAMS, LTD.
111 California Street
Reno, Nevada 89509
(702) 323-8616
Attorneys for Carson-Truckee Water Conservancy District and Sierra Pacific Power Company in Opposition
*Counsel of Record

BOWNE OF SAN FRANCISCO, INC. — A SUBSIDIARY OF BOWNE & CO., INC. — 130 JESSIE STREET, SAN FRANCISCO, CA 94105
BEST AVAILABLE COPY

22pp

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in affirming the district court's conclusion that it is inappropriate to award attorney's fees to petitioner in this case?

2. Whether Congress has authorized the court to make an attorney's fees award under Section 11(g)(4) of the Endangered Species Act, 16 U.S.C. § 1540(g)(4), in a case that does not meet the criteria of Sections 11(g)(1) and 11(g)(2), 16 U.S.C. §§ 1540(g)(1) and 1540(g)(2)?

LIST OF PARTIES*

Respondents, plaintiffs-appellees in the United States Court of Appeals for the Ninth Circuit, are the State of Nevada, the Carson-Truckee Water Conservancy District and the Sierra Pacific Power Company. Petitioner, defendant intervenor-appellant in the Ninth Circuit, is the Pyramid Lake Paiute Tribe of Indians. The Secretary of the Interior, the Commissioner of the Bureau of Reclamation, and the Regional Director, Mid-Pacific Region, Bureau of Reclamation were defendants in the main action, but did not actively participate in the appeal on the attorney's fee issue. By letter dated March 12, 1985, the Solicitor General has advised the Clerk that the Government does not intend to file a brief at this stage of the proceedings unless requested by the Court to do so.

---

*Pursuant to Rules 21.1(b) and 28.1 of this Court, respondents inform the Court that Sierra Pacific Power Company is a subsidiary of Sierra Pacific Resources, which has two additional subsidiaries—Lands of Sierra, Inc. and Sierra Energy Company. Valmy 2 Construction Company is the subsidiary of Sierra Pacific Power Company.

TABLE OF CONTENTS

	Page
Questions presented	i
List of parties	ii
Statute to be construed	1
Statement of the case	2
Reasons why the petition should be denied	4
I	
The decision below does not raise important questions of federal law nor does it frustrate the intent of Congress	4
II	
The decision is in accord with the Court's decision in Ruckelshaus v. Sierra Club	6
III	
The decision below is in accord with the decisions of the Courts of Appeals for the District of Columbia and the Third Circuits	7
IV	
The decision below is supported on independent grounds not reached by the courts below	9
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases

	Page
Alabama Power Co. v. Gorsuch, 672 F.2d 1 (1982)	7, 8
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)	10
Carson-Truckee Water Conservancy District v. Watt, 537 F.Supp. 106 (D.Nev. 1982)	3
Carson-Truckee Water Conservancy District v. Watt, 549 F.Supp. 704 (D.Nev. 1982)	3
Carson-Truckee Water Conservancy District v. Watt, 575 F.Supp. 467 (D.Nev. 1983)	3, 8
Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257 (9th Cir. 1984)	2, 3
Carson-Truckee Water Conservancy District v. Secretary of the Interior, 748 F.2d 523 (9th Cir. 1984)	4, 8
Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C.Cir. 1977)	8
Delaware Citizens For Clean Air, Inc. v. Stauffer Chem. Co., 62 FRD 353 (D.Del. 1974), *aff'd* 510 F.2d 969 (3rd Cir. 1975)	8
Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42 (1982)	5, 7
Hughes v. Rowe, 449 U.S. 5 (1980)	9
Middlesex Cty. Sewerage Auth. v. Sea Clammers, 453 U.S. 1 (1981)	10
Natural Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331 (1st Cir. 1973)	5
Nevada v. United States, 463 U.S. 110 (1983)	5
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)	9

TABLE OF AUTHORITIES CITED

CASES

Page

Ruckelshaus v. Sierra Club, ___ U.S. ___, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983) 6, 7, 9

Sierra Club v. Costle, 657 F.2d 298 (D.C.Cir. 1981) 6

Sierra Club v. Gorsuch, 672 F.2d 33 and 684 F.2d 972 (D.C.Cir. 1982) 5, 6, 7, 8

Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982) 7, 8, 9

Statutes and Rules

Clean Air Act, Section 307(f), 42 U.S.C. §7607(f) 6, 7

Endangered Species Act, Section 11(g):

16 U.S.C. §1540(g) 1

16 U.S.C. §1540(g)(1) ..... i, 1, 3

16 U.S.C. §1540(g)(2) ..... i, 1, 3, 6, 10

16 U.S.C. §1540(g)(4) ..... i, 1, 4, 6, 7, 9

Outer Continental Shelf Lands Act, 43 U.S.C. §1349(a)(5) 7

Toxic Substances Control Act, 15 U.S.C. §2618(d) 7

U.S. Supreme Court Rules:

17.1 5

21.1(b) and 28.1 ii

No. 84-1384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

VS.

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS CARSON-TRUCKEE WATER CONSERVANCY DISTRICT AND SIERRA PACIFIC POWER COMPANY IN OPPOSITION

STATUTE TO BE CONSTRUED

Petitioner seeks attorney's fees under Section 11(g) of the Endangered Species Act (ESA), 16 U.S.C. §1540(g), but cites only one brief excerpt of the relevant statute. Pet. 3.[1] Petitioner ignores the interrelated paragraphs that restrict attorney's fee awards to certain types of cases, 16 U.S.C. 1540(g)(1), and that impose stringent notice requirements, 16 U.S.C. 1540(g)(2). The relevant provision, Section 11(g) of the Endangered Species Act, 16 U.S.C. 1540(g), is reprinted in its entirety in Appendix A.

---

[1] In fact, petitioner misquotes the excerpt it relies upon. Section 1540 (g) (4) provides:

"(4) The court, in issuing any final order *in any suit* brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."

The quotation at page 3 of the petition omits the italicized language.

STATEMENT OF THE CASE

Respondents sued the Secretary of the Interior in 1976 to compel it to sell water from Stampede Reservoir for municipal and industrial use in the Reno/Sparks area. Respondents' theory, in a nutshell, was that because Stampede was authorized and built as a federal reclamation project the Secretary has a mandatory duty under the federal reclamation laws[2] to sell Stampede's water for reimbursable uses, which include municipal and industrial uses. Although Stampede was completed in 1970, the Secretary refused to sell any water and instead used all of it for restoration programs for two endangered species of fish, the cui-ui and the Lahontan cutthroat trout. Those fish constitute the fishery at petitioner's Pyramid Lake Reservation. Throughout this litigation the Secretary has continued to use Stampede's water exclusively for petitioner's fishery.

The Secretary's answer raised numerous defenses, including the Endangered Species Act. The Secretary claimed that the ESA authorized him to use Stampede's water exclusively for the fish, even though that method of operation totally converted Stampede from a reclamation project to a fishery restoration project. The Secretary claimed that the ESA authorizes him to do that, even though some of the water could be sold without jeopardizing the listed species[3] and even though the conversion of the project to serve fishery uses exclusively violates Congress' express $2 million limitation on spending for fish and wildlife development.[4]

---

[2] The reclamation laws that establish the Secretary's duty to seek reimbursement are thoroughly discussed in the Petition for Writ of Certiorari (No. 84-808) filed by Nevada, Carson-Truckee Water Conservancy District and Sierra Pacific Power Company in *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257 (9th Cir. 1984).

[3] The Secretary concedes that Stampede water could be sold for municipal and industrial uses without jeopardizing the cui-ui or the trout. See Interrogatory No. 23 and Federal Defendants' Answer thereto, Trial Exhibit No. 226.

[4] See 43 U.S.C. 614c.

Petitioner, which intervened because it did not believe its economic interests in the fishery would be "adequately represented by the Secretary," Pet. 4, parrotted the Government's answer, including the ESA defense. It raised no new ESA defenses or issues. Instead, it raised several technical defenses including questions of standing, private right of action, and whether or not municipal and industrial use is an authorized use of Stampede's water.

The district court rendered three separate decisions in the case. In *Carson-Truckee Water Conservancy District v. Watt*, 537 F.Supp. 106 (D.Nev. 1982) (*CTWCD I*), it ruled against petitioner on its technical defenses. In *Carson-Truckee Water Conservancy District v. Watt*, 549 F.Supp. 704, 710 (D.Nev. 1982) (*CTWCD II*), it held that the ESA requires the Secretary "to give the Pyramid Lake fishery priority over all other purposes of Stampede until the cui-ui fish and the Lahontan cutthroat trout are no longer classified as endangered or threatened."[5] In *Carson-Truckee Water Conservancy District v. Watt*, 575 F.Supp. 467 (D.Nev. 1983) (*CTWCD III*), it denied petitioner's request for an award of attorney's fees and costs.

The district court denied petitioner's fee request because it concluded that any fee award would be "inappropriate." 575 F.Supp. at 468. The ESA provision upon which petitioner relies, 16 U.S.C. § 1540(g)(4), allows attorney's fee awards in certain types of cases "whenever the court determines such an award is *appropriate*." (Emphasis added.)[6]

---

[5] The Ninth Circuit affirmed in *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257 (1984) (CTWCD IV). Plaintiffs' petition for certiorari, No. 84-808, was denied on March 25, 1985.

[6] Respondents raised in the district court the issue of whether Congress has authorized an attorney's fee award in a case such as this. Section 11(g) plainly restricts attorney's fee awards to private actions that are brought to enforce the ESA against a violator of that Act when the Secretary refuses to discharge his duties under the Act. See 16 U.S.C. §§ 1540(g) (1) and (2). Respondents raised that issue as an additional ground for denying petitioner's attorney's fee request, but the district court and the court of appeals declined to decide it. The issue is discussed in greater detail at Section IV, *infra*.

In deciding that any award would be inappropriate, the district court considered whether the litigation involved important, complex or novel issues, whether it aided in the interpretation of the ESA, and whether the Tribe's efforts had substantially contributed to the goals of the ESA. 575 F.Supp. at 469. Its denial of petitioner's fee application rests squarely on its findings of fact. It found that the Secretary had commenced a recovery program for the cui-ui and trout long before the litigation began, and that the Secretary, not petitioner, had raised the ESA defense. *Id.* at 470. Further, it found that the Secretary made a substantial financial contribution to the defense, and that the Secretary's attorneys had done a "first-class job in defending the case." *Id.* In contrast, petitioner had entered the litigation "primarily for its own economic self-interest" and had contributed principally by raising issues of a "technical nature [that] were not intended to, nor did they, assist in the interpretation or implementation of the Act." *Id.*

Petitioner appealed. The Ninth Circuit, in an opinion by Judge Duniway, affirmed. *Carson-Truckee Water Conservancy District v. Secretary of the Interior*, 748 F.2d 523 (9th Cir. 1984) (*CTWCD V*). It held that the district court had used the correct legal standard to judge appropriateness and that it had not abused its discretion. *Id.* at 526.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE DECISION BELOW DOES NOT RAISE IMPORTANT QUESTIONS OF FEDERAL LAW NOR DOES IT FRUSTRATE THE INTENT OF CONGRESS

At pages 9 through 13 of the petition, petitioner erroneously contends that this case raises important questions of federal law and that the decision below "frustrates" Congressional intent. Petitioner argues that any case involving an Endangered Species issue should result in a fee award to the prevailing party except in "the most exceptional of circumstances." Pet. 13.

Petitioner's argument ignores the plain language of the statute. Section 11(g)(4), 16 U.S.C. § 1540(g)(4), allows the court to

make an award in certain types of cases "whenever the court determines such an award is *appropriate*." (Emphasis added.) Construing almost identical language in the attorney's fee provision of the Clean Air Act, the District of Columbia Circuit explained:

> "Congress expressly used 'appropriate' as the standard in section 307(f); it specifically gave to *courts* the authority to interpret that standard on a case-by-case basis (an entirely logical delegation, since courts would be in the best position to assess the contributions of the parties and the importance of such case). . . . Clearly Congress knows the difference between 'prevailing' and 'appropriate.'" *Sierra Club v. Gorsuch*, 672 F.2d at 42, n 10, emphasis in the original.

Awards are discretionary, not mandatory. Petitioner's argument seeks to deprive the courts of this discretion, even though "Congress intended to give the Courts greater latitude." *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42, 48 (D.C.Cir. 1982). Petitioner's proposed rule of mandatory awards in all but the most exceptional of circumstances would deprive the courts of the ability "to allocate the costs of litigation equitably." *Natural Resources Defense Council v. Environmental Protection Agency*, 484 F.2d 1331, 1338 (1st Cir. 1973).

Furthermore, the case does not meet the criteria of S.Ct. Rule 17.1 which requires "special and important reasons" to warrant the granting of certiorari. The denial of attorney's fees was based on a unique factual situation that is unlikely to recur. The suit was not to enforce the ESA but to enforce the reclamation laws. The ESA was a defense. Long before petitioner became involved, the Secretary had started the fishery restoration program and had raised the ESA defense. Further, petitioner's intervention was prompted by concern for its own economic interests, not concern for endangered species. Pet. 3-4. While petitioner may have reason to distrust the Secretary when its economic interests are involved, *see, e.g., Nevada v. United States*, 463 U.S. 110 (1983), that was not the type of citizen participation that Congress wanted to encourage. To the contrary, Congress expressly disallowed private enforcement actions when the Secretary has

taken action. 16 U.S.C. § 1540(g)(2). Lastly, the case is unlike an ESA enforcement action in that petitioner spent most of its effort trying to prevent the court from reaching the ESA issue.

Because of these peculiar facts, the decision below is of interest only to the parties to the litigation and does not raise any important issue of federal law worthy of review by this Court.

II

THE DECISION IS IN ACCORD WITH THE COURT'S DECISION IN RUCKELSHAUS V. SIERRA CLUB

To interest the Court in this case, petitioner argues that the decision below conflicts with *Ruckelshaus v. Sierra Club*, U.S. , 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983). Pet. 13-18. Petitioner interprets *Ruckelshaus* to require the courts to award attorney's fees to the prevailing party unless there are exceptional circumstances why an award should not be made. Pet. 14. The argument is based on a misreading and misinterpretation of *Ruckelshaus*.

Ruckelshaus was a suit by the Sierra Club and the Environmental Defense Fund in the District of Columbia Circuit for review of the Environmental Protection Agency's standards governing emissions of carbon-dioxide from coal-fueled power plants. The court of appeals rejected the plaintiffs' claims on the merits. *Sierra Club v. Costle*, 657 F.2d 298 (D.C.Cir. 1981). Nonetheless, in *Sierra Club v. Gorsuch*, 672 F.2d 33 and 684 F.2d 972 (D.C.Cir. 1982), it awarded the plaintiffs attorney's fees under Section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f). Like Section 11(g)(4) of the ESA, Section 307(f) of the Clean Air Act allows the court to award attorney's fees in certain proceedings when such an award is appropriate.

This Court reversed that attorney's fee award in *Ruckelshaus v. Sierra Club, supra*. The Court held that some success on the merits must be obtained before a party becomes "eligible" for a fee award under § 307(f). *Ruckelshaus*, 103 S.Ct. at 3276.

In stretching to find a conflict between the decision below and *Ruckelshaus*, petitioner confuses *eligibility* for an award with

entitlement to an award. *Ruckelshaus* dealt with eligibility. It did not consider the question of entitlement and therefore there is no conflict.

III

THE DECISION BELOW IS IN ACCORD WITH THE DECISIONS OF THE COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE THIRD CIRCUITS

Petitioner erroneously contends that the Ninth Circuit's decision conflicts with decisions by the Courts of Appeals for the District of Columbia and the Third Circuits. Pet. 19-20. It argues that the District of Columbia Circuit has established a dualstandard for determining appropriateness depending upon whether the requesting party prevailed on the merits. It claims the district court erroneously applied the non-prevailing party standard by requiring petitioner to show it made a substantial contribution to the goals of the ESA. Again, petitioner misconstrues the cases upon which it relies.

The District of Columbia Circuit decisions, *Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (1982), *Sierra Club v. Gorsuch*, 672 F.2d 33 (1982), *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42 (1982), and *Village of Kaktovik v. Watt*, 689 F.2d 222 (1982), interpreted the "whenever . . . appropriate" standard as used in the attorney's fee provisions of the Clean Air Act, 42 U.S.C. § 7607(f), the Toxic Substances Control Act, 15 U.S.C.§ 2618(d), the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5), and the Endangered Species Act, 16 U.S.C. § 1540(g)(4). Those cases articulated "*one* standard for appropriateness, and that standard allows courts to award attorneys' fees to parties who have 'substantially contributed' to the goals of the . . . Act." *Sierra Club*, 672 F.2d at 42 n 10. (Emphasis in the original.) Further, the court of appeals said that "the relevant inquiry is whether the litigation—successful or not furthered the goals of the Act." *Id.* at 36. The cases "made clear that whether the party claiming costs or fees has prevailed does not control the inquiry on appropriateness, and that the dominant consideration is whether

litigation by the party has served the public interest by assisting the interpretation or implementation of the . . . Act." *Alabama Power*, 672 F.2d at 3.

The District of Columbia Circuit expressly disavowed any suggestion that the prevailing party is automatically entitled to an award of fees. "Even a prevailing or substantially prevailing party who does not substantially contribute to the goals of the . . . Act may not be entitled to attorneys' fees." *Sierra Club*, 672 F.2d at 38 n 8. "'Although a complainant may have substantially prevailed in an action, the award of costs and attorney fees does not automatically follow. There are other factors which the court should consider in determining the appropriateness of an award of costs and attorney fees.'" *Id.* at 39 n 8, quoting *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365 (D.C.Cir. 1977).

The factors which the District of Columbia Circuit considered in determining appropriateness in those cases are the same as the factors considered by the district court in this case, namely whether the litigation involved important complex or novel issues, *Sierra Club*, 672 F.2d at 38-39, *Village of Kaktovik*, 689 F.2d at 224-225, whether the litigation aided in the interpretation of the ESA, *Sierra Club*, 672 F.2d at 40, and whether the requesting party's efforts substantially contributed to the goals of the statute, *Sierra Club*, 672 F.2d at 41, *Village of Kaktovik*, 689 F.2d at 224-225. The district court and the Ninth Circuit used the same test. *CTWCD III*, 575 F.Supp. at 469; *CTWCD V*, 748 F.2d at 525.

Delaware Citizens For Clean Air, Inc. v. Stauffer Chem. Co. 62 FRD 353 (D.Del. 1974), *aff'd* 510 F.2d 969 (3rd Cir. 1975), which is cited at page 20 of the petition, is consistent with this test. Plaintiffs there commenced an action even though the defendant chemical manufacturer was already seeking an EPA variance for more time to comply with emission standards. The EPA, like the Secretary in this case, was actively enforcing the Clean Air Act. The district court held that "a private suit in such circumstances is not the sort of private suit Congress sought to encourage in order to aid the limited enforcement powers of state

and federal regulatory agencies and . . . is not an appropriate case for an award of attorneys fees." 62 FRD at 357.[7]

IV

THE DECISION BELOW IS SUPPORTED ON INDEPENDENT GROUNDS NOT REACHED BY THE COURTS BELOW

Petitioner bases its fee request on Section 11(g)(4) of the ESA, 16 U.S.C. § 1540(g)(4), which provides that:

> (4) The court, in issuing any final order *in any suit brought pursuant to paragraph (1) of this subsection*, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." (Emphasis added.)

Petitioner, however, ignores the italicized language.

Paragraph (1) of Section 11(g) lists three narrowly-defined types of citizen enforcement actions that may be brought under the ESA. They are actions to enjoin any person who is in violation of the Act, actions to compel the Secretary to promulgate

---

[7] Petitioner also argues that review should be granted because the Ninth Circuit's interpretation of the ESA attorney's provision is inconsistent with the interpretations of the attorney's fee provisions in various civil rights acts. Pet. 21-24. But while the District of Columbia Circuit cases involve attorney's fee statutes that are identical to Section 11(g) (4) of the ESA, *Ruckelshaus*, 103 S.Ct. at 3276 n 1, the civil rights statutes cited by petitioner involve different standards and different policy considerations. See *e.g.*, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980). No court of appeals has held that the attorney's fee provisions of the ESA and other similarly-phrased statutes should be construed and applied the same way as the fee provisions of the civil rights acts. And, contrary to the suggestion at page 22 of the petition, the District of Columbia Circuit has not "analogized to the federal civil rights laws" in construing the fee provisions of these environmental acts. *Village of Kaktovik v. Watt*, 689 F.2d 222 (D.C. Cir. 1982), which is cited by petitioner as its authority, does not mention any civil rights act.

emergency regulations, and actions to compel the Secretary to perform non-discretionary duties under the Act. Citizen suits that fit within Section 11(g)(1) are allowed, "except as provided in paragraph (2)." Paragraph (2) contains notice provisions that preclude a private citizen from bringing an action under the ESA until and unless written notice has been given to the alleged violator. Moreover, no private action is allowed if the Secretary has taken action. 16 U.S.C. § 1540(g)(2).

This case does not satisfy these requirements. Petitioner has never sought to enjoin respondents from violating any provision of the ESA. Petitioner has never given any notice required under the notice requirements of Section 11(g)(2). And since the Secretary has been actively carrying out his duties under the ESA, petitioner has never brought an action to compel him to do so. Under the circumstances, the attorney's fee provision of Section 11(g)(4) provides no authority for the award of attorney's fees in this case. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); see also *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

March 27, 1985

ANDREW J. OGILVIE*
JOHN M. COLLETTE
COLLETTE & ERICKSON
555 California Street, 43rd Floor
San Francisco, California 94104
(415) 788-4646

JOHN MADARIAGA
SUSAN L. OLDHAM
SIERRA PACIFIC POWER COMPANY
Post Office Box 10100
Reno, Nevada 89510
(702) 789-4349

JAMES W. JOHNSON, JR.
JOHNSON & ADAMS, LTD.
111 California Street
Reno, Nevada 89509
(702) 323-8616
Attorneys for Carson-Truckee Water Conservancy District and Sierra Pacific Power Company
**Counsel of Record*

(Appendix A follows)

APPENDIX A

Subsection 11(g) of the Endangered Species Act of 1973, as amended, 16 U.S.C. §1540(g), provides as follows:

Citizen Suits

(g)(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority therof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1))B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B) (ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United Sates as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).